No. 96-521

(3)

Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, A Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and JOHN DOES 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

This Court has long afforded First Amendment protection to many forms of peaceful expression in their myriad manifestations. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). The Court has also emphasized that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Indeed, "[n]o particularized inquiry into the precise nature of a particular street is necessary; all public streets are held in the public trust and are properly considered traditional public fora" *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), where "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983).

The panel decision upholding a complete ban (as opposed to regulation) on the sale of message-bearing T-shirts in the entire Waikiki District – a quintessential public forum – is an unprecedented departure from these fundamental principles. Not only does the panel opinion directly conflict with a recent decision of the Second Circuit Court of Appeals, but, as explained below, it underscores the exceptional importance of the First Amendment values that are at the forefront of this case.

I. THERE EXISTS A DIRECT SPLIT BETWEEN THE NINTH AND SECOND CIRCUITS AS TO THE APPLICATION OF GENERAL VENDING LAWS TO THE EXERCISE OF FIRST AMENDMENT SALES ACTIVITIES.

Since filing their petition for writ of certiorari, petitioners have discovered a recent opinion by the Court of Appeals for the Second Circuit pertaining to application

of a commercial vending law to First Amendment sales activities that directly conflicts with the panel opinion here. In *Bery v. City of New York*, Nos. 95-9089(L), 95-9131, 96-7137, 1996 WL 580938 (2d Cir. Oct. 10, 1996) (to be reported at 97 F.3d 689), the court of appeals considered a General Vendors Law that barred visual artists from selling or offering their works for sale in public places in New York City without first obtaining a general vendors license. *Id.* at *1. By virtue of a 1982 amendment, vendors of newspapers, books and other written matter were not subject to the law. *Id.* Additionally, the number of permits was limited to 853 at any particular time, except that qualified vendors who were also veterans were permitted to exceed that number, resulting in a total of 1,193 licenses. *Id.*

In finding the law unconstitutional, the court emphasized several principles that directly conflict with the panel opinion here. First, as do respondents here, Br. Opp. at 1, the City viewed visual art as "mere 'merchandise' lacking in communicative concepts or ideas." *Id.* at *5. The court of appeals, however, condemned this "restricted view of the First Amendment and of visual art itself." *Id.* "Such myopic vision," the court declared, "not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression." *Id.*

Second, both the City and respondents, as well as the court below, seek to distinguish the expressive item from its sale. Br. Opp. at 4. The City, accordingly, argued, like respondents here, that the " 'expression' allegedly impinged by the Regulation is not in fact their art, but their peddling of the art." *Bery*, 1996 WL 580938 at *5. The City further argued, as do respondents and the panel

below, "that appellants are free to display their artwork publicly without a license, they simply cannot sell it." *Id.* The court of appeals was not persuaded. "The sale of protected materials," the court affirmed, "is also protected" *id.*, and "without the money, the plaintiffs would not have engaged in the protected expressive activity." *Id.* at *6. The court further observed that "the street marketing" was an integral "part of the message of appellants' art." *Id.*

Unlike respondents here, Br. Opp. at 5-6, the court of appeals was also inclined to view the regulation as a complete ban on speech, as opposed to a garden variety time, place and manner regulation as petitioners suggest. According to the court, "[t]he ordinances's effective bar on the sale of artwork in public places raises concerns that an entire medium of speech is being lost." *Id.* at *7 (citing *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)). Because the court nonetheless found the restriction to be an invalid time, place and manner regulation, it declined to reach that issue. *Id.*[1]

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[1] *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), *Frisby v. Schultz*, 487 U.S. 474 (1988), *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) do not support *a complete ban* on protected expression as respondents suggest. Br. Opp. at 8-9. Neither *Heffron*, *Frisby*, nor *Clark* entailed a complete ban of speech activities, but rather provided access to the relevant forum under narrowly tailored time, place and manner regulations. *Heffron*, for example, explicitly pointed out that it is "inaccurate to say that Rule 6.05 constitutes a ban on . . . protected activity in the relevant public forum." 452 U.S. at 655. So too did the Court in *Clark* make clear that the restriction on overnight camping was not a complete ban on a form of protected expression, and "otherwise left the

The court acknowledged the City's "significant interest in keeping its public spaces safe and free of congestion." *Id.* However, because the regulation effectively barred the artists from displaying or selling their art on the streets, it found it to be "a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York." *Id.*

As did Judge Pregerson and petitioners here, the court in *Bery* suggested less restrictive alternatives to the ban as part of its narrow tailoring analysis. "The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but *it cannot bar an entire category of expression* to accomplish this accepted objective when more narrowly drawn regulations will suffice." *Id.* (emphasis added).[2] And, unlike the panel here, *Bery* found that the exceptions provided "for veterans and vendors of written material call into question the City's

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demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil." 468 U.S. at 295. In *Frisby*, the Court did not ban residential picketing altogether, but rather required that it be performed in a peripatetic manner. 487 U.S. at 483. And, unlike the situation here, *Taxpayers for Vincent* concerned a nonpublic forum, where the government enjoys much greater latitude in restricting speech.

[2] The court acknowledged, as do petitioners, that the "display of large, cumbersome works" that would block the streets and sidewalks could be subject to "discrete regulation as to time, place and location." *Bery*, 1996 WL 580938 at *8.

argument that the regulation is narrowly tailored." *Id.* at *8.[3]

Finally, as do respondents and the court below, the City argued that "appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the like." *Id.* at *8 The court, however, firmly maintained that "appellants are entitled to a public forum for their expressive activities. . . . Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from those forums." *Id.* at *8. Unlike the panel here, *Bery* concluded that "[t]he sidewalks of the City must be made available for appellants to reach their intended audience. The City has thus

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[3] *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992) (government's interest in maintaining an atmosphere of calm, tranquility and reverence in the vicinity of the Vietnam Veterans Memorial did not extend to the sidewalks functioning as the entrance to the Memorial, where "the value of serenity . . . is already severely compromised, both by the presence of many pedestrians not visiting the Memorial and by the constant flow of vehicles, including trucks, along Constitution Avenue itself and even within the 13-foot wide service road lying between Constitution and the sidewalk."); *United States v. Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992) (court found decibel restriction on the volume of musical instruments in Lafayette Park to burden substantially more speech than required; government's interest only marginally applicable to the National Capital Region parks, including the Mall, which are "exposed to every form of urban commotion – passing traffic, bustling tourists, blaring radios, performing street musicians, visiting school children.").

failed to meet the requirement of demonstrating alternative channels for appellants' expression." *Id.* at *9.[4]

Bery is thus fully applicable to the facts, circumstances and legal theories relevant to this petition in that it creates a direct conflict with the holdings reached by the majority below.

II. THE RATIONALE AND HOLDING OF *BERY* IS FULLY CONSISTENT WITH THE PRIOR DECISIONS OF THIS AND OTHER COURTS.

The rationale of *Bery* finds expression in analogous decisions of this Court and other courts. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1942), for example, the Court recognized that even "the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Id.* at 110-11. In more recent times, the Court has observed that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). And, in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) this Court found that "[a]lthough § 501(b) [of the Ethics in Government Act of 1978] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation [for making speeches or writing articles] imposes a significant burden on expressive activity." *Id.*

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[4] The court of appeal also found that the exception for the sale of books, newspapers and other written matter must fall under the Equal Protection Clause. *Bery*, 1996 WL 580938 at *9.

at 1014. The Court explained that the ban on "compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output" and will "impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 1015. The Court thus held that "the honoria ban imposes the kind of burden that abridges speech under the First Amendment." *Id.*

In finding "parody trading cards" featuring active major league baseball players to be fully protected speech, the court in *Cardtoons v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996) emphasized that the protection is not lessened because the materials are sold rather than given away. The court observed that "many untraditional forms of expression are . . . protected by the First Amendment" *id.* at 969, and "even if the trading cards are not a traditional medium of expression, they nonetheless contain expressive speech." *Id.*

Unlike the panel here, the court in *Cardtoons* further concluded that the trading cards were not "commercial merchandise rather than protected speech," and could "see no principled distinction between speech and merchandise that informs our First Amendment analysis." *Id.* at 969-70. In contrast to the panel decision here, the court stated that "the fact that expressive materials are sold neither renders the speech unprotected, . . . nor alters the level of protection under the First Amendment." The court thus concluded that Cardtoons need not give away its trading cards in order to bring them within the ambit of the First Amendment. *Id.* at 970.

And in perhaps the most definitive statement yet, the court in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995) observed with respect to the sale of message-bearing T-shirts as follows:

> Allowing groups to give away T-shirts is not an ample alternative means of communication. Few non-profit groups can afford to give away large numbers of message-bearing T-shirts, which cost money to design, print and produce. The sale of T-shirts is also the primary means by which many . . . groups are able to raise money in order to continue to engage in spreading their message.

Id. at 685.

Contrary to respondents' assertion that there are no "unresolved First Amendment issue of exceptional importance," Br. Opp. at 5, the question of whether sales activities tied to the dissemination of expressive materials may be banned is one of extraordinary significance that will have a profound affect on the activities of thousands of First Amendment practitioners.

III. *ISKCON V. RIDENOUR* DOES NOT SUPPORT THE DECISION OF THE PANEL IN THE PRESENT CASE.

In an attempt to magnify the impact of *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995) on the present case, respondents accuse petitioners of concealing *ISKCON* from this Court. Br. Opp. at 16-17. This accusation is false.

In *ISKCON*, a majority panel upheld the constitutionality of 36 C.F.R. § 7.96(k)(2)(1993) as applied to the sale of religious *beads* and *audio cassette tapes* by members of the Hare Krishna religion in the National Capital

Region parks. *ISKCON* was extensively discussed and distinguished in *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995), where Judge Sporkin enjoined enforcement of *amended* section 7.96(k)(2)(1995) as applied to the sale of message-bearing T-shirts. Petitioners, in turn, have expressly relied upon and cited *Friends* in support of their contention that the Honolulu peddling ordinance is also unconstitutional as applied to their expressive activities. Respondents' accusation of concealment is thus without merit.

So too is respondents' claim that *ISKCON* supports the decision of this panel Br. Opp. at 19. It has long been recognized that each medium of communication is unique unto itself and must be assessed by standards particularly suited to it. *E.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion). The court in *Friends* duly noted that the majority panel in *ISKCON* "upheld the ban on sales *as applied* to beads and audio-tapes," but "was silent with respect to message-bearing T-shirts." 899 F. Supp. at 683 (emphasis added). The court, therefore, properly analyzed the sales regulation as applied to message-bearing T-shirts, which occasion unique and independent standards distinct from those which attach to religious beads and audio cassette tapes.

There exist other distinctions between *ISKCON* and the present case as well. For example, the *ISKCON* panel focused its "narrow tailoring" analysis on the underinclusiveness of the sales regulation. 61 F.3d at 956-58. Petitioners' narrow tailoring argument in the present case, however, does not turn upon the underinclusiveness of the Honolulu peddling ordinance. Rather, petitioners

rely upon well-established decisions of this Court that make clear that a regulation burdens more speech than necessary if it is not aimed at the exact source of the problem which it seeks to remedy. *E.g., Frisby,* 487 U.S. at 485. Since the Honolulu ordinance is aimed directly at the core of petitioners' expression, rather than at the incidental effects of expression such as pedestrian traffic congestion, it fails to satisfy the standard followed by this Court. As Judge Sporkin thus pointed out in *Friends,* the City has "employed a cleaver where a scalpel would suffice." 899 F. Supp. at 687.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1996